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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EDWARD BOWEN, Defendant and Appellant.	E062263 (Super.Ct.No. BLF1300221) OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., and Dale R. Wells, Judges. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael E. Bowen was incarcerated at Chuckawalla Valley State Prison when he was observed during visitation swallowing items given to him by his visitor, Jeri Elizabeth Danilewicz.[1] He later vomited up the items. They were discovered to be two bindles; one containing marijuana, and the other containing the drug Tramadol Hydrochloride.

Defendant was found guilty of possession of a controlled substance (marijuana and/or Tramadol) while incarcerated in state prison within the meaning of Penal Code section 4573.6.[2] The trial court also found true in a bifurcated proceeding that defendant had suffered two prior serious or violent felony convictions within the meaning of sections 667, subdivision (c)(1) and 1170.12, subdivision (c)(1). The trial court sentenced defendant to 25 years to life.

Defendant makes the following claims on appeal: (1) The trial court erred and violated his federal constitutional rights to due process and a fair trial by instructing the jury that they could find defendant guilty of possession of Tramadol for the charged offense, because it is not a controlled substance; (2) the trial court failed to conduct a *Marsden*[3] hearing; (3) admission of his prior drug-related administrative violations deprived him of a fair trial; (4) his prior felony convictions were not admissible for impeachment; (5) one of his prior serious and violent felony convictions should have

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[1] Defendant was charged with Danilewicz but she entered a guilty plea prior to trial. She is not a subject of the instant appeal.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

been stricken pursuant to section 1385 and *People v. Superior Court (Romero)* 13 Cal.4th 497 (*Romero*); and (6) the restitution fine imposed pursuant to section 1202.4, subdivision (b)(1) should be reduced.

We find merit in defendant's argument that there was instructional error, but do not reverse his conviction because we find the jury necessarily found him guilty of possession of marijuana, which was sufficient to support his section 4573.6 conviction. We affirm the judgment.

FACTUAL BACKGROUND

A PEOPLE'S CASE-IN-CHIEF

Correctional Officers Phillip Johnson and Leticia Espinoza worked in the Investigative Services Unit at Chuckawalla Valley State Prison. The Investigative Services Unit was tasked with keeping controlled substances from being brought into the prison. Inmates who were suspected of ingesting controlled substances that they received from an outside source were kept on contraband watch. Contraband watch involved putting the inmate in waist restraints and placing him or her in a specially designed suit. The inmate remained that way until he or she passed the contraband through a bowel movement. It was very uncomfortable for the inmate.

Officers Johnson and Espinoza were monitoring the visiting rooms on December 8, 2012. The visiting rooms were videotaped. Defendant was an inmate at the prison. The officers were informed by another correctional officer that he believed he saw defendant swallow something that his visitor, Danilewicz, passed to him. Officers Johnson and Espinoza reviewed the video. Danilewicz had an arm sling on her left arm.

She reached in and pulled out a small item. She placed it in or near a chip bag that was on the table. Defendant grabbed the item and swallowed it.[4] Defendant was placed in restraints and put on contraband watch.

Later, defendant wanted to speak with Officer Johnson. Defendant advised Officer Johnson that he had swallowed two bindles containing marijuana and Tramadol pills. He was willing to vomit them up. Officer Johnson gave him an empty bag and defendant vomited into the bag. Two bindles were recovered from the bag. The bindles were opened and one contained what looked like marijuana. The other contained 12 pills. Both were usable amounts. The bindles were purple.[5]

The substances were tested. One bindle contained .20 grams of marijuana.[6] The other bindle tested positive for Tramadol Hydrochloride. The jurors were informed that defendant had been found guilty by a preponderance of the evidence at an administrative hearing while incarcerated in state prison for conspiracy to introduce marijuana into prison and on another occasion of being under the influence of methamphetamine.

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[4] Officer Johnson later reviewed the entire video of the visitation that day and observed defendant swallow a second bindle.

[5] Another correctional officer, Officer Sham Birla, testified that the bindles were green when he saw them in the bag of vomit. The vomit itself was green.

[6] The marijuana was tested a second time and found to be .17 grams.

B. DEFENSE

Defendant claimed that he had wanted to get tattoo ink, which was not allowed in state prison,[7] and ordered it from another inmate. When he was walking to his visit with Danilewicz, he walked through the prison yard. He was handed two green bindles which he believed contained the tattoo ink. He swallowed them before entering the visiting room. Defendant denied he ever received any contraband from Danilewicz; he only put chips in his mouth in the visiting room. He never told the correctional officers the bindles contained marijuana and Tramadol. The bindles he threw up were green.

DISCUSSION

A. INSTRUCTIONAL ERROR

Defendant contends that his conviction must be reversed based on the trial court erroneously instructing the jury that it could convict him of violating section 4573.6 based on his possession of Tramadol. Defendant contends Tramadol is not a controlled substance.

1. *ADDITIONAL FACTUAL BACKGROUND*

Defendant was initially charged with one count of possession of marijuana and one count of possession of Tramadol. Just prior to trial, the People amended the information to charge only one count because the contemporaneous possession of two or more controlled substances at the same time while incarcerated constituted only one violation of section 4573.6.

[7] The jury was informed that defendant had prior convictions for murder and rape.

No discussion of the jury instructions is included in the record.

The jury was instructed that in order to find defendant guilty of section 4573.6, it could find he possessed either marijuana or Tramadol, or both. They were instructed on the elements of the offense, including that Tramadol was a controlled substance and that "defendant knew of the substance's nature or character as a controlled substance." The trial court defined usable amounts as "a quantity enough to be used by someone as a controlled substance. Useless traces or debris are not usable amounts. On the other hand, a usable amount does not have to be enough in either amount or strength to affect the user." The jury was also instructed, "The People allege that the defendant possessed the following items: Marijuana and/or Tramadol. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these items and you all agree which item he possessed."

2. *ANALYSIS*

To convict a defendant of possessing an unauthorized controlled substance in a penal institution, the following elements must be shown: (1) the defendant possessed a controlled substance; (2) the defendant knew of the presence of the controlled substance; (3) the defendant knew of its nature as a controlled substance; (4) there was a sufficient amount of the substance to be usable; and (5) the defendant was in jail or under the custody of prison officials. (§ 4573.6; *People v. George* (1994) 30 Cal.App.4th 262, 277.)

"The Health and Safety Code lists the various substances it controls in five extensive schedules. ([Health & Saf. Code,] §§ 11054-11058.) The listings include

'official, common, usual, chemical, [and] trade name[s].' ([Health & Saf. Code,] § 11053.) The code also regulates 'analogs' of listed controlled substances (analogs) . . . ." (*People v. Davis* (2013) 57 Cal.4th 353, 358 (*Davis*).) "An analog is defined as a substance that: (1) has a substantially similar chemical structure as the controlled substance, or (2) has, is represented as having, or is intended to have a substantially similar or greater stimulant, depressant, or hallucinogenic effect on the central nervous system as the controlled substance." (*Id*. at p. 358, fn. omitted.) The parties do not dispute that Tramadol is not listed in the Health and Safety Code as a controlled substance.

Here, the jury was advised that they could find defendant guilty of possession of Tramadol because it was a controlled substance. However, it was not listed as a controlled substance. Further, there was no expert testimony that it was an analog or its effects on the user. As such the instruction was erroneous to the extent it instructed the jury that it could convict defendant of violating section 4573.6 by possessing Tramadol.

The People first contend that defendant waived the argument the jury was erroneously instructed because his counsel essentially conceded that it was a controlled substance. However, "it is well settled that no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge." (*People v. Mil* (2102) 53 Cal.4th 400, 409.)

Further, respondent presents evidence (scientific journals) for the first time on appeal that Tramadol is an analog of codeine, a substance listed in Health and Safety Code section 11055. The People contend that it is "undisputed" that it is an analog of

codeine. While it may be true that these journals provide as such, this is the same type of argument that was raised by the People in *Davis* and rejected.

In *Davis*, *supra*, 57 Cal.4th 353, the defendant was charged with possession of 3,4–methylenedioxymethamphetamine (MDMA), a substance not specifically listed as a controlled substance. (*Id*. at pp. 356, 358.) The jury was only given the scientific name of MDMA and was not presented with any expert testimony as to whether MDMA met the definition of a controlled substance or analog. The defendant appealed his conviction on the grounds of insufficient evidence that MDMA was a controlled substance. On appeal, the appellate court took judicial notice of several scientific treatises offered by the People to show that MDMA was related to methamphetamine. Further, the appellate court stated that the name itself was enough to show that it was a controlled substance. (*Id*. at p. 357.)

The California Supreme Court granted review. First, it noted that, "[T]he jury may find that MDMA is a controlled substance or analog based on evidence of MDMA's chemical composition or its effects on the user. Here, as the Court of Appeal recognized, the record contains neither a stipulation nor testimony establishing that MDMA meets the definition of a controlled substance or analog." (*Davis*, *supra*, 57 Cal.4th at p. 359.)

The Supreme Court continued, "While the Court of Appeal, having referred to outside sources, satisfied itself that the pills in question qualified as a controlled substance, those sources were not before the jury. [Citation.] All the jury had before it was a chemical name not listed in any schedule of the code. An appellate court cannot take judicial notice of additional facts the prosecution failed to prove at trial to affirm a

conviction." (*Davis*, *supra*, 57 Cal.4th at p. 360.) The court also rejected that the jury could rely on common knowledge or common sense that MDMA contained methamphetamine because it was included in the scientific name. (*Id*. at p. 360.)

The Supreme Court concluded, "Because it is not specifically listed in any schedule, evidence of MDMA's chemical name, standing alone, is insufficient to prove that it contains a controlled substance or meets the definition of an analog. '[T]he matter in issue is . . . not within the common knowledge of laymen.' [Citation.] Thus, it was incumbent on the People to introduce competent evidence or a stipulation about MDMA's chemical structure or effects. Without such evidence, there was no rational basis for a jury of laypersons to infer that 3,4–methylenedioxymethamphetamine contains methamphetamine or amphetamine, or that it has a substantially similar chemical structure or effect to methamphetamine or amphetamine. The Court of Appeal erred in concluding that sufficient evidence supported defendant's convictions for possession and sale of a controlled substance." (*Davis, supra,* 57 Cal.4th at pp. 361-362, fn. omitted.)

As in *Davis*, here the jury was only given the name Tramadol, which was not listed as a controlled substance in any statute. The prosecution had to present evidence or a stipulation that Tramadol was an analog of codeine. This was not in the common knowledge of the jury. The People cannot now correct the error by asking this court to take judicial notice of scientific treatises that were not before the jury. Based on the foregoing, the jury was improperly instructed that it could convict defendant of violating section 4573.6 due to his possession of Tramadol.

Despite the instructional error, reversal is not required. "[I]nstruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) The California Supreme Court has held that such determination must be based on a finding of beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Here, defendant was seen swallowing two items in the visitor's room. He was immediately put on contraband watch. After a short time, he disclosed that he had swallowed both marijuana and Tramadol. Defendant vomited up both bindles. One of the bindles contained .20 grams of marijuana and Officer Johnson testified it was a usable amount. Defendant had previously possessed marijuana in state prison.

There was no reason for the jury to distinguish between the two bindles vomited up by defendant. Defendant never contested that one of the bindles contained marijuana or argued that there was not a usable amount. The only defense raised was that defendant thought he swallowed bindles containing tattoo ink, and that the bindles he swallowed were green, not purple. There is nothing in the record to support that the jury somehow found defendant guilty of only possessing Tramadol, and not marijuana. The evidence overwhelmingly supported his conviction for violating section 4573.6 by his possession of marijuana.

Defendant contends that the jury may have "questioned" that the marijuana was a usable amount because .2 grams did not "sound like very much." As noted by the court in *Guiton*, "In analyzing the prejudicial effect of error, . . . an appellate court does not *assume* an unreasonable jury. . . . An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1127.) The record supports that the jury necessarily found defendant possessed both controlled substances, especially in light of the fact that defendant had previously possessed marijuana and that he did not contest there was a usable amount. Any instructional error was harmless.

B. *MARSDEN* HEARING

Defendant insists that his conviction must be reversed because the trial court failed to conduct a hearing on his *Marsden* motion.

1. *ADDITIONAL FACTUAL BACKGROUND*

Defendant appeared with stand-in counsel on July 1, 2014. Defendant's regular counsel was in trial on another matter and was seeking a continuance of defendant's trial date. Defendant was asked if he agreed with the continuance and he asked to address the court. He stated, "This case is a year and a half old. This is the third time that I'm going to have to postpone because of my attorney. I want to go to trial, your Honor." The trial court advised defendant that his counsel was engaged in another trial. The trial court also advised defendant that the court system was backed up and a trial was not possible that day. The trial court offered to shorten the continuance time. Defendant then asked, "Is it possible for a *Marsden* hearing?" The trial court responded, "Not today because I don't

have [defense counsel] here. You can't tell me what your position is unless I have [defense counsel] here to be able to tell me his side. So until [defense counsel] gets here, we can't do that." The trial court admonished defendant's stand-in counsel that defense counsel needed to be advised that defendant did not want to waive any further time for trial. The matter was continued to July 8.

The case was heard again on July 8. Defense counsel stated on the record that he was not ready to proceed to trial due to a travel commitment on another case. Defense counsel wanted further time to prepare for defendant's case. Defense counsel asked defendant on the record, "[Defendant], do you mind if we continue your last day a little bit until I take care of my business in San Francisco?" Defendant responded, "I do not object to that." Defendant was asked if he would waive time until August 1. Defendant responded, "I do, your Honor."

The next day, the trial court recalled the parties and advised them they could proceed to trial that day. Defense counsel objected. The trial court wanted to proceed with trial. Defendant asked to address the court. Defendant stated, "Sir, thank you. I'm not upset at anybody, either, sir. Yesterday—or, excuse me, last week I asked you for a—a *Marsden* hearing. That's because I haven't had any opportunity to talk to my attorney except right here in this court. Yesterday we had to even stop because we were bothering you. I agreed for the postponement yesterday because I assumed we were going to have time to be able to talk about my case. That's why I agreed. [¶] I'm—we're not ready to go to trial, sir. I'm looking at 25 years to life in this case. I haven't had any time to talk to my attorney except right here. Never have I had a minute of

confidential time with my attorney, sir. Thank you." Defense counsel responded, "The time that I could use between now and the other date in [the] future could benefit both me and my client." The trial court ignored the requests to continue the case and ordered that the case be sent out to trial that afternoon. The matter proceeded to trial on July 9.

2. *ANALYSIS*

"*Marsden* motions are subject to the following well-established rules. '"'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'"'" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

In *People v. Vera* (2004) 122 Cal.App.4th 970, the Court of Appeal stated, "While we are aware of no precedent finding abandonment of a *Marsden* motion, it is established that a defendant's conduct may amount to abandonment of a request to represent himself under *Faretta v. California* (1975) 422 U.S. 806[. Citations.] If a defendant can abandon his request to substitute himself for counsel, a defendant can abandon his request to substitute another counsel." (*Id*. at pp. 981-982; see also *People v. Jones* (2012) 210 Cal.App.4th 355, 361-362 [Fourth Dist., Div Two][citing *Vera* with approval].)

The record here establishes that defendant no longer wished to pursue a *Marsden* hearing. Defendant originally appeared with stand-in counsel and was clearly upset that the case was being continued. He was advised that counsel must be present for a *Marsden* hearing.[8] At the next hearing, defendant's counsel sought another continuance and defendant stated on the record that he had no objection. Defendant acknowledged that he had previously brought a *Marsden* motion, but had done so because he and trial counsel had not had an opportunity to talk about the case. He gave no indication that he continued to want to have a *Marsden* hearing. Even after the trial court refused to continue the case, defendant did not pursue the *Marsden* hearing.

We find defendant abandoned his *Marsden* request.

C. ADMISSION OF PRIOR ADMINISTRATIVE VIOLATIONS

Defendant insists that he was deprived of his right to a fair trial by the erroneous admission of his prior drug-related administrative violations.

1. *ADDITIONAL FACTUAL BACKGROUND*

Prior to trial, the prosecution brought a motion to introduced defendant's prior uncharged or charged prior acts. The motion sought to introduce defendant's prior drug-related offenses he had suffered while incarcerated to establish that defendant had knowledge of the substance he obtained as a controlled substance. It also sought to introduce the prior drug-related offenses to show lack of mistake or accident. The

[8] "One of the purposes of a *Marsden* hearing is to afford counsel the opportunity to address the defendant's concerns with respect to the defendant's representation and to explain counsel's performance." (*People v. Horton* (1995) 11 Cal.4th 1068, 1123.)

prosecution argued that the probative value was not substantially outweighed by the prejudice.

At a pretrial hearing on the motion, the prosecutor presented a stipulation that she proposed to defense counsel to enter just the fact of the prior administrative violations rather than presenting witnesses on the priors. The trial court inquired of defendant's counsel whether defendant was willing to accept the stipulation. Defendant's counsel stated, "Well, first, I would like to object as to any introduction of any evidence on these issues on 1101 for the record. And once you rule on that, I can [go] to the next part if you deny me that, which would be in the manner in which the People were allowed to bring it in. First I object to any 1101(b) evidence."[9] The trial court overruled the objection. Defendant's counsel agreed to stipulation because it was in defendant's best interest to sanitize the information. The stipulation was read to the jury.

The jury was also given a limiting instruction as follows: "The People presented evidence that the defendant committed other offenses referred to in 'People's and Defense's 1101(b) Stipulation 3" that were not charged in this case. [¶] . . . [¶] . . . You may, but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant knew of the substances' nature or character as controlled substances when he allegedly acted in this case; or the defendant's alleged actions were not the result of mistake or accident. [¶] In evaluating this evidence, consider the

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[9] The People contend that defendant waived his claim by failing to make a specific objection to the Evidence Code section 1101, subdivision (b) evidence on the grounds it did not show absence of mistake or accident. It was clear the purpose for which it was being admitted and defendant objected.

similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] The uncharged offenses are only one factor to consider along with all the other evidence. They are not sufficient by themselves to prove that the defendant is guilty of a violation of Penal Code 4573.6. The People must still prove the charge beyond a reasonable doubt."

2. *ANALYSIS*

Evidence Code section 1101, subdivision (b) provides, in relevant part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact []such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ." "Evidence of other crimes is not admissible merely to show criminal propensity, but it may be admitted if relevant to show a material fact such as intent." (*People v. Jones* (2011) 51 Cal.4th 346, 371.)

Absence of mistake or accident is related to both knowledge and intent. A "knowledge element is akin to absence of mistake." (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 242.) Further, absence of mistake can rebut a claim of innocent intent. (*Ibid.*) "'To be admissible to show intent, "the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance."'" (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

Here, the People had to prove, as set forth *ante*, that defendant possessed a controlled substance and knew of its character. The fact that defendant had previously possessed marijuana in prison was clearly relevant to whether he knew the bindles contained marijuana. He clearly was aware, based on his prior conviction, of the nature of marijuana, and that possessing it in prison would have consequences. Further the fact that he had previously been under the influence of drugs in prison showed his willingness to take illicit substances thus negating any claim that he had no prior experience with drugs.

Defendant contends that his defense was not accident or mistake. Rather, he argued that he had not swallowed any drugs and that the bindles contained tattoo ink. His prior knowledge of drugs in prison was not relevant to counter any claim of ignorance, mistake or accident. However, defendant's plea of not guilty put all of the elements of the offenses in issue. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Balcom* (1994) 7 Cal.4th 414, 422.) Defendant's knowledge that marijuana was a controlled substance was an element of the charged offense that the prosecution was required to prove. Even if defendant did not actually dispute the issue at trial, the "'prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" (*People v. Jones*, *supra*, 51 Cal.4th at p. 372.) The fact that defendant had previously been convicted of possession of marijuana while in prison was relevant to prove that he knew marijuana was a restricted drug and that he should not be in possession of it in prison.

Moreover, the trial court did not abuse its discretion by concluding that the possible prejudice did not outweigh the probative value of the evidence. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For purposes of Evidence Code section 352, prejudice means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.) Defendant argues that the probative value of the evidence was "incredibly high" given the nature of the charges.

The evidence of the prior administrative violations did not involve an undue consumption of time, as the parties stipulated that only the fact of the violations could be admitted. Moreover, the prior violations were certainly no more inflammatory than the charges in this case. The jury was advised that defendant had been found guilty of administrative violations for the possession of marijuana and being under the influence, diminishing the possibility that the jury would seek to punish him for the prior violations. Finally, the jury was instructed that it could not "conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

Defendant contends the jury likely concluded that since he was involved in a prior conspiracy to bring drugs in to the prison, he likely was in possession of marijuana and Tramadol in this case, an impermissible use of this evidence. """"'We have long recognized "that if a person acts similarly in similar situations, he probably harbors the

same intent in each instance" [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.'"""" (*People v. Thomas* (2011) 52 Cal.4th 336, 355-356.)

Even if the evidence was improperly admitted, defendant cannot show prejudice. Reversal is only required if it is reasonably probable that a more favorable result would have occurred had the prior conviction been excluded. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[10]

Initially, the jury was instructed that it could not convict defendant based solely on the prior acts evidence but rather must base its verdict on the totality of the evidence. We presume the jury followed the instructions. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.)

Moreover, there was overwhelming evidence of defendant's guilt. Here, defendant was seen swallowing two items in the visitor's room and was immediately watched. He then disclosed that he had swallowed both marijuana and Tramadol. Defendant vomited up both bindles, which were found to contain marijuana and

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[10] Defendant contends that his federal constitutional rights were implicated by the admission of the prior drug-related violations. As such, the error must be evaluated under the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Our Supreme Court has held that the erroneous admission of other acts is state law error evaluated under *Watson.* (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125.)

Tramadol. Any conceivable error in admitting the prior drug-related violations was clearly harmless.

D. IMPEACHMENT WITH PRIOR FELONY CONVICTIONS

Defendant additionally contends that the trial court erred by admitting evidence for impeachment purposes that he had previously been convicted of murder and rape.

1. *ADDITIONAL FACTUAL BACKGROUND*

The prosecution filed a motion prior to trial to admit defendant's prior felony convictions for purposes of impeachment. The prosecution provided that defendant had prior convictions of murder (§ 187, subd. (a)) and rape (§ 261) for which he was currently incarcerated.

Defendant's counsel objected, "[H]e did these acts when he was very young over about 35 years ago. I really feel that it's more prejudicial than probative. You know, the previous crimes were violent and heinous. It was maybe murder and rape. We're dealing with just drugs. I'm not saying drugs [are not] important. But by introducing the other act of murder and rape, is going to have the jury confused, biased, prejudiced for them to be able to fairly look at the facts for just having drugs in prison. [¶] They can be told that he's in for a very serious act. I think that's more than sufficient."

Defendant's counsel asked why the jury could not just be told he was convicted of a crime of moral turpitude instead of a detailed description of the crimes. The trial court asked the prosecutor why the jury could not just be told that defendant had been convicted of serious crimes of moral turpitude, rather than rape or murder. The prosecutor responded that defendant should be treated as any other witness who took the

stand. The type of crime would be admitted. The trial court agreed and allowed the crimes to be admitted if defendant testified. The jury was informed defendant had prior convictions of rape and murder.

The jury was instructed at the end of the presentation of evidence as follows: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. [¶] If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It's up to you to decide the weight of that fact and whether that fact makes the witness less believable."

2. *ANALYSIS*

"'Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding.'" (*People v. Clair* (1992) 2 Cal.4th 629, 654.) However, the "trial courts retain their discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial effect." (*Ibid.*) In exercising its discretion, the trial court may consider the four factors identified by the Supreme Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453. (*Clair*, at p. 654.) These include, "(1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not

testify out of fear of being prejudiced because of the impeachment by prior convictions." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 [Fourth Dist., Div. Two].)

"'[T]he trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes. . . . The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.'" (*People v. Hinton* (2006) 37 Cal.4th 839, 887.)

The prior felony convictions were properly admitted in this case. Defendant does not dispute the first factor: that his prior convictions for rape and murder involved moral turpitude. As for the second factor, defendant argues that the 1980 rape conviction and 1983 murder conviction were too remote in time.[11] Here, defendant was still in prison on the rape and murder. This militates against him claiming he led a blameless life since the convictions. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1056.) Additionally, he did not lead a "blameless" life in prison as evidenced by the drug-related violations that occurred while he was incarcerated. The trial court properly determined that remoteness did not warrant excluding the prior convictions. Third, the convictions were not similar to the instant crimes and the trial court was not required to sanitize the priors. Finally, defendant testified at trial. This factor also favors admission. (*Id*. at p. 1056.) Defendant's prior convictions were properly admitted for impeachment purposes.

[11] Although there are two conviction dates, the charges were part of one case.

We review the erroneous admission of prior felony convictions under the *Watson* standard: whether it is reasonably probably the erroneous convictions affected the result. (*People v. Collins* (1986) 42 Cal.3d 378, 392.) Here, defendant's credibility was already questionable. Defendant was incarcerated and had several prior drug offenses. Further, as stated *ante*, the evidence overwhelmingly established that defendant swallowed marijuana, that he told Officer Johnson that he had swallowed marijuana, and that he had previously brought marijuana into prison for which he received an administrative violation. The evidence overwhelmingly established defendant's guilt and the prior felony convictions did not affect that result.

E. STRIKE PRIOR SERIOUS OR VIOLENT FELONY CONVICTIONS

Defendant contends that the trial court erred by denying his motion to dismiss one of his prior strike convictions.

1. *ROMERO MOTION*

Defendant's counsel brought an oral motion to strike one of defendant's prior serious or violent felony convictions. The two prior convictions arose out of the rape and murder of a 15-year-old girl in 1979. On October 6, 1979, defendant drove the victim home from a roller-skating rink. The following morning, she was found dead due to seven blows to her head; she had been raped. Defendant's counsel argued that defendant was 17 years old when he committed the rape and murder. Further, there was only one single act and one victim. The rape and murder were committed during the same course of conduct. Defendant's counsel stated that treating the priors as separate strikes was not

within the spirit of the "Three Strikes" law. Moreover, the current drug crime was not violent or serious.

The prosecutor argued that the nonviolent nature of the current crime did not take it outside the spirit of the law. Further, defendant had committed other crimes while in prison. The probation report detailed other rule violations he had in prison, which included being found in a sexual compromising position with another inmate; he possessed alcohol; assaulted another inmate; and had possession of contraband. Further, the prosecutor argued the facts of *People v. Vargas* (2014) 59 Cal.4th 635, 640—a case in which the Supreme Court found that carjacking and robbery were a single act against a single victim requiring striking one of the convictions—were not analogize to this case.[12]

The trial court first noted that, in *Vargas*, the defendant's convictions arose from the stealing of the same car. It rejected defendant's motion, finding it was unlike the situation in *Vargas* because one could not say that rape and murder were the same act.

2. *ANALYSIS*

We review the trial court's ruling refusing to strike a prior conviction for abuse of discretion. (*Romero*, *supra*, 13 Cal.4th at p. 504; see also *People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) The discretion the Supreme Court recognized in *Romero* is extremely limited, and may only properly be exercised in the unusual case where, "in light of the nature and circumstances of his present felonies and prior serious and/or

[12] Defendant has conceded that the rape and murder were not a single act like the carjacking and robbery in *Vargas*, but nonetheless, the trial court abused its discretion by refusing to dismiss one of his strikes.

violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony, supra,* 33 Cal.4th at p. 378.)

There are no extraordinary circumstances. Here, defendant committed a heinous murder and rape of a young girl. Once in prison, he did not abide by the prison rules. He continuously broke the rules by bringing drugs into the prison, engaging in sexual activity and assaulting other inmates. Based on defendant's criminal history and current convictions, the trial court's decision to not strike one of his prior convictions was "neither irrational nor arbitrary." (*Carmony, supra,* 33 Cal.4th at p. 379.)

E. *RESTITUTION FINE*

Defendant contends the trial court improperly relied upon the 2014 amendment to section 1202.4, subdivision (b) to impose a $300 restitution fine. He argues this violated the prohibition against ex post facto laws because the amendment occurred after he committed the crime in 2012, when the minimum restitution fine was $240.

At the time of sentencing, the trial court ordered as follows: "To pay the restitution fine in the amount of $300. Division of Adult Institutions to collect that obligation. You're ordered to pay the additional parole revocation fine in the amount of $300, which is suspended unless parole is revoked." There was no objection or explanation of the calculation by the trial court.[13]

Effective January 1, 2014, the minimum restitution fine to be imposed pursuant to section 1202.4, subdivision (b) was increased to $300. Prior to that date, the minimum fine was $240. (Stats. 2011, ch. 358, § 1.) "It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions." (*People v. Souza* (2012) 54 Cal.4th 90, 143.) Defendant committed his crime prior to the amendment of section 1202.4 in 2014, and could claim an ex post facto violation if the trial court imposed the minimum restitution fine based on the amendment in 2014.

Initially, the People contend that defendant has waived the claim by failing to object to the amount in the trial court. The failure to make a timely and meaningful objection forfeits or waives certain claims on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) This includes "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons." (*Id.* at p. 356.) "The appropriate amount of restitution is precisely the sort of factual determination that can and should be brought to the trial court's attention if the defendant believes the award is

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[13] The probation report did not state that it was recommending the minimum restitution fine.

excessive." (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218 [Fourth Dist., Div. Two].) Since defendant did not object to the amount of restitution, and as we find *post*, the fine was not unauthorized, he has forfeited the claim on appeal.

Defendant's restitution fine did not result in an unauthorized sentence. The court had the discretion to lawfully impose the greater fine of $300 prior to the amendment to section 1202.4. The range was between $240 and $10,000. (§ 1202.4, subd. (b).) There is nothing in the record to support that the trial court intended to impose the minimum restitution fine. There was no ex post facto error because the court imposed a lawfully authorized fine.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.